Supreme Court, U. S.
FILED
NOV 6 1979
MICHAEL RODAK, JR., CLERK

Nos. 79-412 and 79-416

In the Supreme Court of the United States

OCTOBER TERM, 1979

PAULINE RUST, PETITIONER

v.

PAUL JOHNSON AND NORA JOHNSON

CITY OF LOS ANGELES, PETITIONER

v.

PAUL JOHNSON AND NORA JOHNSON, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B 9-21)[2] is reported at 597 F. 2d 174. The district court's opinion (Pet. App. A 1-8) is not reported.

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[1]Counsel for respondents Paul and Nora Johnson has asked us to note that they join in this brief in opposition.

[2]"Pet. App." refers to the petition in No. 79-416.

JURISDICTION

The judgment of the court of appeals (Pet. App. B 9) was entered on May 10, 1979. Rehearing was denied on June 14, 1979 (Pet. App. C 22). Separate petitions for a writ of certiorari were filed by Pauline Rust (No. 79-412), and by the City of Los Angeles (No. 79-416) on September 12, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a special assessment for street improvements, levied by the City of Los Angeles against property mortgaged to the Federal National Mortgage Association, created a valid lien which could be enforced by nonjudicial foreclosure proceedings instituted after the Department of Housing and Urban Development acquired fee simple title to the property.

STATEMENT

The Federal National Mortgage Association (FNMA) is a federally chartered, private corporation organized under Section 302(a) of the National Housing Act, 12 U.S.C. 1717(a), and Section 801 of the Housing and Urban Development Act of 1968, 12 U.S.C. 1716b. The Department of Housing and Urban Development (HUD) insures qualified private lenders against losses on residential mortgage loans under Section 203 of the National Housing Act, 12 U.S.C. 1709 (see 24 C.F.R. 200.5). FNMA is authorized to purchase, sell, or otherwise deal in HUD-insured mortgages under Section 302(b) of the National Housing Act, 12 U.S.C. 1717(b). FNMA may be an actual mortgage holder; HUD is limited to the role of a mortgage insuror.

The property involved in this case is a single-family residence in Los Angeles originally purchased by Cecil and Jeweline Presley in December 1968 with a mortgage loan insured by HUD (then the Federal Housing Administration). HUD assigned the mortgage in April 1969 to FNMA. The Presleys defaulted on the mortgage payments and FNMA commenced foreclosure proceedings on July 19, 1971.[3] The following month, August 14, 1971, petitioner City of Los Angeles, pursuant to state law,[4] issued a bond to the contractor for street improvements assessed against the property but not paid.

The total assessment on the property was $158.36, payable in separate annual installments of principal and interest. FNMA paid the first assessment installment of $14.00 when it was due. In March 1972 FNMA conveyed title to the property to HUD, in exchange for mortgage-insurance benefits (see 12 U.S.C. 1710(a)). While HUD owned the property, four assessment payments totalling $33.36 became due, but HUD did not pay them.

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[3]FNMA foreclosure proceedings were completed and a trustee's deed sale was held on January 11, 1972, at which time FNMA obtained complete ownership of the property.

[4]Cal. Sts. & Hy. Code § 5000 *et seq.* (West 1969) sets forth the procedures for levying special assessments and recovering payments by issuance of a bond. After the public improvement work is performed, an assessment is recorded, which then becomes a lien on the property benefitted (§ 5372). If the property owner does not pay the full assessment amount within 30 days (§ 5390), the City will issue a bond to the contractor. The City then collects regular assessment payments, with interest, which are paid over to the contractor or bondholder (§ 5397). A bond, when issued, becomes a lien on the property. If the assessment payments are not made, the bondholder may either institute a suit directly against the property owner for the full amount of the assessment (§ 5411), or demand in writing that the City sell the property and satisfy the lien (§ 6500). See *Thibodo* v. *United States*, 187 F. 2d 249, 253-255 (9th Cir. 1951).

On July 18, 1973, HUD signed a contract of sale for the property with respondents Paul and Nora Johnson. On July 26, 1973, while HUD still owned full fee interest in the property, the City sent a notice that the property was to be sold for the delinquent special assessment payments. The City consulted the tax assessment records, but not the county title records, and sent notices of sale to former owner Presley (at the property address), to FNMA, and to HUD. HUD's deed to the Johnsons was recorded on September 21, 1973, and the Johnsons obtained a purchase-money loan from a private lender secured by a HUD-insured deed of trust. That deed of trust was then assigned to FNMA in January 1974.

In February 1974, the City again sent a notice of impending sale to FNMA and to Presley, but not to HUD, the owner of record at the time the City's foreclosure had commenced, or to the Johnsons, the actual owners in residence. The City sold the property to petitioner Rust on March 18, 1974, for $146.65 and issued her a certificate of sale. One month before the statutory twelve-month redemption period was to expire, the City posted a notice to redeem on the subject property and mailed a copy to the Johnsons. No attempt was made to redeem, and the City deeded the property to Rust on March 31, 1975.

The Johnsons remained in residence, and Rust filed an ejectment action in state court in January 1976. The Johnsons answered and cross-claimed against Rust, the City, and HUD, alleging that the sale to Rust was illegal and seeking to quiet title to the property. HUD removed the action to the United States District Court for the Central District of California.

The district court concluded (Pet. App. A 1-8) that the City's lien and foreclosure proceedings were invalid and quieted title to the property in the Johnsons, subject to the outstanding deed of trust and note assigned to HUD.

The court of appeals affirmed (Pet. App. B 9-20). It held that the imposition of a special assessment lien by the City against a mortgage interest held by FNMA constituted an exercise of state power against property of the United States (Pet. App. B 12-16); and that the City's foreclosure sale, without protecting the federal interest in the property, was invalid under the Supremacy Clause (Pet. App. B of 16-21).

ARGUMENT

The decision of the court of appeals is correct, and there is no conflict among the circuits. The question presented does not warrant further review.

1. The court of appeals applied to the facts of this case the well-settled principle that federal mortgage interests are not subject to state tax enforcement actions.

This principle was first announced in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 435 (1819), which held that the United States and its property are immune from state and local taxes. That immunity prevails unless there is an express congressional waiver subjecting federal property to local taxation. *Mayo* v. *United States*, 319 U.S. 441, 448 (1943); *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 122 (1954).

The fact that Los Angeles chooses to finance street improvements by imposing special assessment liens, instead of general property taxes, cannot circumvent federal immunity. Special assessments are as detrimental to the federal interest as direct taxes. *Lee* v. *Osceola Improvement Dist.*, 268 U.S. 643, 644-645 (1925). Where,

as here, a city imposes assessments against a federal interest, it cannot enforce the liens against the property. *Mullen Benevolent Corp.* v. *United States*, 290 U.S. 89, 94-95 (1933).

When the City instituted foreclosure proceedings, HUD held the property in full fee ownership. Congress has provided a narrow waiver of the usual immunity from taxation of real property acquired by HUD in Section 7 of the National Housing Act, 12 U.S.C. 1706b, and a somewhat broader waiver of immunity for real property acquired by FNMA in Section 309 of that Act, 12 U.S.C. 1723a(c)(2). Those waivers include no consent to special assessments, and do not indicate a congressional intent to subject HUD or FNMA to state foreclosure proceedings.

The City relies on *United States* v. *Brosnan*, 363 U.S. 237 (1960), as establishing that federal property interests may be subject to state nonjudicial foreclosure proceedings. However, as the court of appeals recognized (Pet. App. B 19), *Brosnan* does not govern here. In *Brosnan*, the United States was asserting a tax lien for a debt unrelated to the real property, and this Court subordinated that lien to a prior secured creditor's lien. Furthermore, the foreclosure proceedings conducted under state law arose from consensual agreements between the property owner and the holders of the prior liens.

The court of appeals' decision is consistent with the traditional principles of tax and foreclosure immunity accorded a federal property interest. The status quo regarding both private property rights and federal interests remains unaltered. As this Court declared in *New Brunswick* v. *United States*, 276 U.S. 547, 556 (1928), a mortgage interest of the United States "is paramount to the taxing power of the State and cannot be subjected by the City to sale for taxes."

2. The Ninth Circuit's decision does not conflict with *United States* v. *Kimbell Foods, Inc.*, No. 77-1359 (Apr. 2, 1979). *Kimbell* involved the priority of security interests held by the Small Business Administration and the Farmers Home Administration.[5] Under the terms of both the direct federal loans and the federally guaranteed loans which the lenders and borrowers had agreed to, and pursuant to controlling federal regulations, compliance with state procedures for perfecting and maintaining valid security interests was explicitly mandated. In that context, this Court determined that for those federal loan programs, state law should be adopted to determine the priority of federal liens. *Kimbell* has no bearing on this case, which involves extrajudicial enforcement against FNMA and HUD of nonconsensual liens created by operation of state law.

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[5]Petitioners contend (City Pet. 13-14, Rust Pet. 10-11) that FNMA's status as a federally chartered private corporation, subject to limited federal regulation, precludes FNMA from any protection as a "federal instrumentality." But the court of appeals' decision to the contrary is squarely within the spirit of *Kimbell*, which noted that both the SBA and FHA performed federal functions, that their rights derived from federal sources, and consequently that the priority of federal liens sufficiently implicated federal interests so as "to warrant the protection of federal law." *United States* v. *Kimbell Foods, Inc.*, *supra*, slip op. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1979

DOJ-1979-10